88-1211

Supreme Court, U.S.
FILED
JAN 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS W. HUNT and WILLIAM J. HUNT,

Petitioner,

v.

JEFFERSON SAVINGS AND LOAN ASSOCIATION,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

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QUESTIONS PRESENTED

The due process clause of the U.S. Constitution, Fourteenth Amendment, protects substantial rights but does not guarantee particular forms of procedure. States may legislate and regulate some elements of the relationship between creditors and debtors, including the provision of a reasonable and fair frame-work of rules which facilitate real estate lending practices. In Texas, the centerpiece of real estate lending is the deed of trust which names a trustee and grants to the trustee a power of private, non-judicially supervised sale.

The questions presented in this Petition are:

(1) When the petitioner's real and valuable interest is deprived by legislated procedures which provide that after constructive notice, a non-judicial foreclosure of a deed of trust lien may be implemented, followed by a creditor's suit and entry of judgment against the debtor in the amount of the deficiency remaining after sale, does this form of procedure constitute a deprivation of petitioner/debtor's Fourteenth Amendment due process rights?

(2) Has the involvement of the state, through legislating a form of procedure for non-judicial real estate foreclosures, with no statutorily protected right of redemption, a registration system for recording trustee's deeds after such non-judicial action coupled with the exposure of the debtor to civil suit, judgment and writs of execution issued by a state court, met the Fourteenth Amendment "state action" requirements?

(3) In the creditor/debtor deed of trust transaction, where non-judicial foreclosure procedures in conformance with applicable state statute are expressed, is there a knowing and intelligent waiver by the debtor of any due process protections reflected or reasonably inferred?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the preceding below are the Petitioners, DOUGLAS W. HUNT and WILLIAM J. HUNT, and the Respondent, JEFFERSON SAVINGS AND LOAN ASSOCIATION.

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No. _____

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OCTOBER TERM, 1988

DOUGLAS W. HUNT and WILLIAM J. HUNT,
Petitioners,

VS.

JEFFERSON SAVINGS & LOAN ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

The Petitioners, DOUGLAS W. HUNT and WILLIAM J. HUNT respectfully pray that a Writ of Certiorari issued to the Texas Supreme Court to review the judgment and opinion of the Texas Supreme Court for the State of Texas entered on October 26, 1988.

OPINIONS BELOW

The Order overruling Petitioners request for rehearing by the Texas Supreme Court is reprinted in the Appendix to this Petition. The Court of Appeals opinion affirming the summary judgment granted by the Trial Court is also printed in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1257.

STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Fourteenth Amendment

2. TEX. PROP. CODE §51.002:

§51.002. Sale of Real Property Under Contract Lien

(a) A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. The sale must take place in the county in which the land is located, or if the property is located in more than one county, the sale may be made in any county in which the property is located.

(b) Notice of the sale must be given at least 21 days before the date of the sale:

(1) by posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;

(2) by filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) by the holder of the debt to which the power of sale is related serving written notice of the sale by certified mail on each debtor, who, according to the records of the holder of the debt, is obligated to pay the debt.

(c) Service of a notice by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address ***.

3. TEX. PROP. CODE §11.001:

Section 11.001. Place of Recording

(a) To be effectively recorded, an instrument relating to real property must be eligible for recording and must be recorded in the county in which a part of the property is located.

4. TEX. PROP. CODE §12.001:

Section 12.001. Instruments Concerning Property

(a) An instrument concerning real or personal property may be recorded if it has been acknowledged or proved according to law.

5. TEX PROP. CODE §13.002:

An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

STATEMENT OF CASE

Jefferson Savings and Loan Association ("Jefferson") brought the action that is the basis of this appeal in the 160th District Court of Dallas County, Texas, against Douglas W. Hunt and William J. Hunt ("Petitioners") based on five (5) separate promissory notes, secured by five (5) separate deeds of trust, each dated October 25, 1982, and delivered to Jefferson's predecessor in title, Congressional Mortgage Corporation of Texas, and which were subsequently assigned to Jefferson.

Each of the deeds of trust contained a specific clause, Paragraph 18, that provided specific requirements and the procedures necessary in order to accelerate the payment of the monthly payment terms of the promissory notes in the event of a default and further procedures required to exercise the option of power of sale after a proper acceleration.

Some time after making the five (5) promissory notes secured by the five (5) deeds of trust, Petitioners defaulted in the payments on the promissory notes whereupon Jefferson, the then holder of the promissory notes, by letter accelerated the total debt of each note, thereafter appointed a substitute trustee and exercised the power of sale on April 1, 1986. At such sale, Jefferson was the one and only bidder and was the purchaser of the five (5) properties at the trustee's sale.

Jefferson then brought suit seeking judgment for a deficiency created by the trustee's sale.

Petitioners filed their Answer to the Original Petition asserting as defenses that the deeds of trust did not contain provisions for automatic acceleration; did not grant the automatic right of acceleration and foreclosure without complying strictly and specifically with the provisions of the deeds of trust; that Jefferson had failed to follow the required procedure prescribed in the deed of trust to affect acceleration directing attention specifically to the requirements contained in Paragraph 18 of each of the deeds of trust and the failure to observe such requirements; alleging that the exercise of the power of

sale had been accomplished without proper acceleration of the indebtedness, and were wrongful foreclosures; that pursuant to the allegations in Jefferson's Original Petition in the 160th District Court of Dallas, County, Texas there were allegations that evidenced a single bid and sale of five (5) separate parcels of property each of which had been secured by a separate deed of trust rather than evidence of five separate trustee's sales, one for each deed of trust and upon which there was no cross collateralization; that such single sale "chilled" the bidding at the trustees sale; that the successful bidder at the trustee's sale had received "value equal to its indebtedness" by virtue of the requirement contained in the hazard insurance provisions of the deed of trust whereby the lender, Jefferson, required hazard insurance to be maintained on the properties in amounts and for such hazards as would be directed by Jefferson and for the "full value of the security"; that such requirement thereby established as between Jefferson and Petitioners, the "value of the security", such "value" being equal to the amount of the indebtedness; and further that if there existed a deficiency, Jefferson should be entitled to credit against such deficiencies of the amount of private mortgage insurance that Petitioners had been required to pay premiums upon as a loan requirement by Jefferson.

Thereafter, Petitioners filed their Counterclaim and Cross-Claim against Jefferson alleging wrongful foreclosure occasioned by the trustee's sales based upon flawed exercise of the acceleration as required by Paragraph 18 of the deeds of trust; damages for waste committed by Jefferson, and damages of loss of the value in the separate properties together with other damages.

Jefferson filed its Motion for Summary Judgment alleging no genuine issues as to any material facts, supporting its Motion by an Affidavit together with exhibits thereto attached.

Petitioners filed their response to Jefferson's Motion for Summary Judgment attaching as exhibits thereto its Amended Answer to Plaintiff's Original Petition with its exhibits; and the

affidavits in support of Petitioners Answer to Jefferson's Motion for Summary Judgment.

The Trial Court entered judgment in favor of Jefferson from which Appellants appealed. The Court of Appeals affirmed the Trial Court's Judgment. The Texas Supreme Court refused to grant a writ of error, stating that no reversable error was found in the record. Petitioners requested a rehearing by the Texas Supreme Court, which motion was denied.

Throughout the summary trial and appeal, Petitioners repeatedly objected to the inadequacy of notice, the manner of the trustee's sale and the inadequacy of the sale price received by the trustee. These are the same due process arguments advanced in this petition although U.S. constitutional phraseology may not have been expressly included by Petitioners in their arguments before the Texas Trial Court, Court of Appeals and the Texas Supreme Court.

REASONS FOR GRANTING THE WRIT

THE DUE PROCESS REQUIREMENTS OF MEANINGFUL NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO THE TIME OF SEIZURE AND SALE OF PROPERTY WAS DENIED PETITIONERS

A borrower, securing a loan with a deed of trust lien on real property, under the Texas scheme, has a real and present interest — that of title to the subject real estate. The deed of trust does not deprive the borrower of title. The interest of the debtor, consequently, is protected by the Fourteenth Amendment.

The creditor, too, has an interest in the property subject to the deed of trust lien. However, that interest is not normally at risk of waste, and real property generally is not movable from the jurisdiction of local authorities as is the case when personal property is involved. Where movable property is concerned,

competing interests and risks must be recognized. These competing interests have been recognized and discussed in *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 94 Sup. Ct. 1895, 40 L Ed 2d 406 (1974). In *Mitchell,* the creditor's interest was in household goods in the hands of the debtor/possessor. The Louisiana statute consequently was viewed by the Court as addressed to the risk of deterioration, waste or removal. This Court, in *Mitchell,* expressed the view that the Louisiana statutory procedure reached a constitutional accommodation of the conflicting interests of the creditor and debtor as regards movable property. The creditor's interest in this case, is not exposed to the same kind or degree of risk, since the property interest is in real estate.

The TEX. PROP. CODE §51.002(a) and predecessor legislation, provides no judicial supervision of the trustee, acting for the lien holding creditor in regard to the power of sale. The notice, provisions mandate only constructive notice. TEX. PROP. CODE §51.002(b). Foreclosure, sale and disposition of sale proceeds are all carried out by the trustee named in the deed of trust. No statutory redemption rights are provided. The County Clerk of the County where the property is situated records the trustee's deed. TEX. PROP. CODE §11.001 and §12.001. The Texas statutory scheme does not afford the debtor any assurance of judicial supervision "all along the way" or any right of redemption. Texas law does afford a debtor, dispossessed of title resulting from a foreclosure and sale, a cause of action for wrongful foreclosure. But, this is not due process protection of an existing property interest. It is merely the substitution of a new property interest in exchange for the property interest seized and sold. Perhaps, it is an interest of significantly less value to the debtor than the interest taken.

The judicial action which has come up through Texas appeals process on which this Petition is founded is not one in the nature of a supervision of the conduct of the seizure, the foreclosure, the sale, or, disposition of sale proceeds. Rather, it

is a suit instituted by the creditor for civil judgment against the debtor arising out of a deficiency remaining due after applying the net sale proceeds from the non-judicial foreclosure sale to the principal and interest due under the debtor's note to the Respondent. There is no judicial supervision and protection of due process afforded to the debtor and his interest during the non-judicial taking, foreclosing, selling and disbursal of sale proceeds in this kind of action. The seizure and sale at the time this suit was instituted, had already been completed.

The Court decision in *Mitchell* addresses facts and the balancing of interest not present in this case. Appropriate to this case are the principles expressed in *Fuentes v. Shevin,* 407 U.S. 67, 92 Sup. Ct. 1983, 32 L Ed 2d 556 (1972). The Court, in *Fuentes* said this:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." 407 U.S. at 81.

Consistent with this statement in *Mitchell,* it was found that the Louisiana sequestration statute, under examination in that case, in fact, provided judicial control of the process from the beginning to the end. See *Michell,* 416 U.S. at 616.

The Fifth Circuit of the United States Court of Appeals in *Barrera v. Security Building and Investment Corporation,* 519 F 2d 1166 (1975) examined the Texas statute establishing the non-judicial foreclosure and sale of real estate in a suit brought by the debtor who had lost their residence in a non-judicial foreclosure sale conducted pursuant to a deed of trust. In *Barrera,* the action was founded on 42 U.S.C. §1983, for damages. The second shoe had not been dropped in *Barrera* as is the case brought by the Petitioners. In *Barrera,* the creditor, after non-judicial foreclosure, sale, conveyance and disbursal of sale proceeds, engaged in no further action judicial or non-judicial. No attempt was made by the creditor to sue for and establish a judgment for a deficiency. The Fifth Circuit, consequently, addressed mainly the questions of whether or not

the fact of statutory regulation by a state alone is sufficient to implicate the state for Fourteenth Amendment state action purposes. *Barrera,* at 1170-71. The Fifth Circuit also overlooked other state actions which normally will follow the trustee's sale.

The approach of the Fifth Circuit in *Barrera* actually turned the Fourteenth Amendment upside down, rendering "state action" analysis the primary focus and the due process protection a minor theme. The District Court in *Turner vs. Blackburn,* 389. F. Supp. 1250 (W.D. North Carolina, 1975), found not only "state action" but also the failure of the North Carolina statute to provide adequate notice, coupled with an opportunity to be heard, appropriate to the nature of the case. *Turner* at 1258-59.

STATE ACTION IS PRESENT

Barrera stands only for the proposition that the Texas statutory scheme, without more, is insufficient to constitute state action. In *Lugar v. Edmondson Oil Company, Inc. and Ronald L. Barbour,* 457 U.S. 922, 102 Sup. Ct. 2744, 73 L Ed 2d 482 (1982) state action is found where state officers act jointly with a private creditor in securing the property in dispute. The County Clerks in Texas, where transfers of real estate are recorded, certainly act jointly with the trustee, who is acting for the benefit of the secured creditor in selling and transferring title of real property after a sale made pursuant to the deed of trust. Tex. Prop. Code §§11.001, 12.001 and 13.002. The *Lugar* test for the presence of "state action" controls. Additionally, the use of court proceedings in *Dahl v. Akin,* 630 F. 2d 277 (1980), a "liberty" case, was found to constitute "state action" by the Fifth Circuit. *Dahl,* at 280-81. On the other hand, in *Girard v. 94th Street and 5th Avenue Corporation,* 530 F.2d 66 (2nd Cir. 1976), the Second Circuit held the enforcement by a court of a lease provision requiring the consent of the board of directors of the lessor to a lease assignment not to constitute state action,

discussing, at length, this Court's decision in *Shelley v. Kraemer*, 334 U.S. 1, 68 Sup. Ct. 836, 92 L Ed 1161 (1948). The court action, however, in *Girard*, was in the nature of declaratory relief. The Petitioners here have not only seen the creditor avail itself of the Texas courts, but also has felt the real and present weight of governmental authority when the Texas Court entered a deficiency judgment against them.

State action is present. Texas legislation establishing the non-judicial foreclosure process, providing only the minimum notice protection to the debtor — that is constructive notice — and the land registration offices and officers of the State for purposes of recording the trustee's deed is enough for "state action" analysis. Additionally, the statutory scheme deprives the debtor of the protection of redemption yet reserves to the creditor, the offices of the court for purposes of suing out and taking judgment against the debtor for any deficiency, and the availability of such writs and processes as are available to judgment creditors generally.

FINDING A WAIVER OF DUE PROCESS STRAINS THE NATURE OF THE TRANSACTION AND IS UNFAIRLY ONE-SIDED UNLESS WAIVER BY THE CREDITOR IS ALSO FOUND

It is not disputed that parties may waive due process rights. It is often said that such waiver must be an informed waiver and made intelligently. Various forms of contract may present facts demonstrating the waiver of due process rights but the facts of each case controls. *D. H. Overmyer Co. v. Fick Co.*, 405 U.S., 174, 92 Sup. Ct. 775, 31 L Ed. 2d 124 (1972); *Swarb v. Lennox*, 405 U.S. 191, 92 Sup. Ct. 767, 31 L Ed. 2d 138 (1972). The deed of trust contract between the creditor and the debtor in this case, however, does not have the waiver of due process rights as a main or even subsidiary purpose. The deed of trust transaction has as its main purpose the granting to the creditor of the right of non-judicial foreclosure, in accordance with applicable Texas statutes, and the reduction of such statutorily governed contractual provisions into a writing to be filed as part

of the deed records pertaining to the subject real estate. The intervention of the state in legislating a statutory scheme for the non-judicial foreclosure leaves no room for any implication of the intention of the debtor, to knowingly and intelligently waive due process rights. *United States v. Wynn*, 528 F.2d 1048 (5th Cir. 1976) and like decisions misconstrue the actual transactions which occur when the deed of trust is signed.

The often expressed argument of waiver, moreover, is one-sided and, therefore, unfair. If waiver issues arise in this relm of examination of due process rights, then to remain within the bounds of reason, it should be considered as a dual waiver, or exchange of waivers. The exchange of waivers would be the debtor's waiver of such due process rights as would otherwise prohibit state action in support of non-judicial foreclosures. In exchange for the debtor's waiver, the deed of trust would be interpreted to include creditor's waiver of the right to enter into court, after a non-judicial foreclosure, to seek judgment for deficiency and obtain the writs of the court in enforcement of the judgment.

In Texas, creditors contemplating foreclosure know at the time the foreclosure proceeding is instituted whether or not there is a probability of a deficiency. This knowledge flows from the creditor's concern with the holding in *Durrett vs. Washington National Insurance Company*, 621 F.2d 201 (5th Cir. 1980). Nearly every foreclosure is undertaken with one eye on the *Durrett* rule regarding foreclosure bidding and the other on the prospect of the debtor seeking the protection of the Bankruptcy Code to forestall or delay the foreclosure sale. Updated appraisals are frequently secured. Consequently, it does not impose any burden upon creditors not already imposed on them to inform themselves of whether or not there is a prospect of a deficiency.

If the prospect of deficiency exists and the creditor desires not to waive it's right to enter into court and avail itself of the judicial process to obtain judgment and writs of enforcement to recover the deficiency, then such creditor should enter the court

at once seeking a judicially supervised foreclosure process, thereby assuring the debtor actual notice and opportunities to be heard at all relevant times.

CONCLUSION

JEFFERSON SAVINGS AND LOAN ASSOCIATION holds a title to the real property seized and sold out from under the Petitioners as well as a Texas Judgment against the Petitioners. The transfer, the sale resulting in a deficiency, the judgment on the deficiency all bear a common stain. They comprise benefits acquired in a seizure and sale which rode roughly over Petitioner's due process rights. The State of Texas acted all along the way, by legislating the non-judicial scheme, by registering trustee's deeds and by opening the doors of Texas courts to JEFFERSON for its pursuit of a deficiency judgment. The Fourteenth Amendment reaches all this joint action of the legislature, the trustee, Texas registration clerks, and the trial court which combined to bring about the result. Due process requires all such actions be set aside.

Respectfully submitted,

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APPENDIX

1. The Order of the Texas Supreme Court

IN THE
SUPREME COURT OF TEXAS

No. C-7758.

DOUGLAS W. HUNT and
WILLIAM J. HUNT

vs.

JEFFERSON SAVINGS & LOAN
ASSOCIATION

From DALLAS COUNTY
Fifth District

September 14, 1988

Application of petitioners for writ of error to the Court of Appeals for the Fifth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and *hereby is, denied.*

It is further ordered that applicants, Douglas W. Hunt and William J. Hunt, pay all costs incurred on this application.

No. C-7758.

DOUGLAS W HUNT and
WILLIAM J. HUNT

vs.

From DALLAS COUNTY,
Fifth District

JEFFERSON SAVINGS & LOAN
LOAN ASSOCIATION

October 26, 1988

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the

27th day of October, 1988.

Mary M. Wakefield, Clerk

By _____

COURTLAND CROCKER
Deputy Clerk

2. The Judgment of the Court of Appeals

IN THE

COURT OF APPEALS

Fifth District of Texas
at Dallas

DOUGLAS W. HUNT and
WILLIAM J. HUNT

Appellants,

v.

JEFFERSON SAVINGS & LOAN
ASSOCIATION,

Appellee.

No. 05-87-00749-CV

JUDGMENT

In accordance with this Court's opinion of May 16, 1988, the judgment of this Court is as follows: The judgment of the trial court is AFFIRMED. It is ORDERED that appellee Jefferson Savings & Loan Association recover its costs of this appeal from appellants Doughas W. Hunt and William J. Hunt and from the cash deposit in lieu of appeal bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Charles Marcus, attorney for Douglas W. Hunt.

May 16, 1988.

ED KINKEADE
Justice

3. The opinion of the Texas Court of Appeals

IN THE

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-87-00749-CV

DOUGLAS W. HUNT and WILLIAM J. HUNT, *Appellants,* v. JEFFERSON SAVINGS & LOAN ASSOCIATION, *Appellee.*	FROM A DISTRICT COURT OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES HOWELL, LAGARDE AND KINKEADE
OPINION BY JUSTICE KINKEADE

May 16, 1988

Appellants, Douglas W. and William J. Hunt (Hunt) appeal a summary judgment rendered for appellee, Jefferson Savings and Loan Association (Jefferson) for a $184,498.77 deficiency created by a trustee's sale of five properties. The suit is based on five promissory notes, secured by deeds of trust, executed by Douglas W. Hunt and William J. Hunt (as co-maker) and delivered to Jefferson's predecessor in interest, Congressional Mortgage Corporation of Texas. After default by Hunt on payment of each note, Jefferson foreclosed on the properties and sued Hunt for deficiencies on each note, plus attorneys fees, interest, and costs. Hunt counterclaimed, seeking damages for wrongful foreclosure plus attorneys fees. The trial court granted summary judgment in favor of Jefferson denying Hunt's counterclaim.

In four points of error, Hunt claims the trial court erred in: 1) granting Jefferson's motion for summary judgment because the note acceleration and the trustee's foreclosure sale was improper; 2) granting Jefferson's motion for summary judgment because a fact question exists as to irregularities at the trustee's sale; 3) failing to find that a fact question exists as to whether the lender received property "equal to the value of its indebtedness;" and 4) failing to find that a fact question exists as to whether Hunt is entitled to a credit for the amount of insurance proceeds Jefferson received from the Private Mortgage Insurance policy. Jefferson, in its sole cross-point, requests damages for delay. We overrule all points of error and the cross-point and affirm the judgment.

On October 25, 1982, Hunt borrowed $263,000 from Congressional Mortgage Corporation of Texas for the purchase of five condominiums. Hunt executed five promissory notes, agreeing to make installment payments and other obligations under the notes until all payments were made. Douglas Hunt executed and delivered five deeds of trust on the properties as collateral to secure payment of the notes. On October 29, 1982, Congressional transferred the notes and all interest in the properties to Jefferson. Hunt subsequently defaulted under the terms of the notes and deeds of trust.

On January 8, 1986, Jefferson sent Hunt notice that unless payment was made, it intended to exercise its options under the deeds of trust and accelerate the notes. This would result in foreclosure of the properties. The notice also stated that after acceleration, Hunt had the option to reinstate the loan and/or bring suit alleging any defenses. On March 10, 1986, Jefferson sent Hunt notice that acceleration had taken place, all unpaid payments were declared due and payable and that a substitute trustee's sale would take place on April 1, 1986. On April 1, 1986, the trustee sold the properties for $125,280 resulting in a deficiency of $182,498.77. Jefferson filed suit for the deficiency.

In point of error one, Hunt claims the summary judgment was improper because Jefferson failed to follow requirements of the deeds of trust to accelerate and all foreclosures were wrongful. We disagree. When the holder of a promissory note has the option to accelerate maturity of the note upon the maker's default, equity demands notice be given of the intent to exercise the option. *Brown v. Hewitt,* 143 S.W.2d 223, 224 (Tex. Civ. App. — Galveston 1940, writ ref'd). Thus, absent waiver, the holder of a delinquent installment note must present the note and demand payment of the past-due installments prior to exercising his right to accelerate. *Allen Sales and Servicenter, Inc. v. Ryan,* 525 S.W.2d 863, 866 (Tex. 1975). In the case of a mortgage secured by a deed of trust, such notice must afford an opportunity to cure the default and bring home to the mortgagor that failure to cure will result in acceleration of the note and foreclosure under the power of sale. *Lockwood v. Lisby,* 476 S.W.2d 871, 873 (Tex. Civ. App. — Fort Worth 1972, writ ref'd n.r.e.). If, after such notice, the mortgagor fails to remedy the breach, then the mortgagee is authorized to accelerate maturity and begin foreclosure proceedings under the deed of trust. *See Natali v. Withaus,* 134 Tex. 513, 135 S.W.2d 969, 977 (1940).

Hunt contends Jefferson did not properly accelerate the notes because notice was not sent to Hunt. We disagree. The initial notice of January 8, 1986, set forth the breach — the non-payment; the action required to cure the breach-payment of $38,351.98; the deadline to cure — February 10, 1986; and the result of failure to cure — acceleration.

Hunt failed to cure the default and on March 10, 1986, Jefferson sent a second notice declaring all unpaid amounts due and payable and that the properties would be foreclosed on April 1, 1986. Summary judgment was properly granted since all notices required by law and by the deeds of trust were met. We overrule Hunt's first point of error.

Hunt, in point of error two, claims the trial court erred in failing to find that a question of fact exists as to whether or not there was substantial irregularity at the substitute trustee's sale. Hunt contends that a single bid and single sale occurred for all five properties, chilling the bidding and resulting in an inadequate sale price.

Mere inadequacy of consideration is not grounds for setting aside a trustee's sale, but evidence of an irregularity that causes or contributes to a grossly inadequate price is. *American Savings v. Musick*, 531 S.W.2d 581, 587 (Tex. 1975). Evidence showing that a better price would have resulted if the sale was conducted in a different manner is required. *Ballah v. First National Bank of Hereford*, 474 S.W.2d 785, 788 (Tex. Civ. App. — Eastland 1971, writ ref'd n.r.e.). Hunt failed to present any evidence to raise a fact question as to whether the consideration was inadequate or any irregularity occurred. Jefferson attached an exhibit to its motion for summary judgment setting forth in detail the amounts that were bid on each property. This evidence along with the fact that the properties were separately posted for sale and that separate substitute trustee deeds were executed, supports the court's findings that a proper sale occurred. Hunt's second point of error is overruled.

In point of error three, Hunt claims the trial court erred in failing to find that pursuant to the lender's imposed hazard insurance requirements, a fact question existed as to whether the lender as the successful purchaser at the substitute trustee's sale received property "equal to the value of its indebtedness." We disagree.

Hunt contends that they were required to maintain hazard insurance on each property equal to the loan values and Jefferson is bound by those values at foreclosure. No authority is cited by Hunt for this proposition. Jefferson asserts that the insurance requirement is merely evidence of the amount of risk, if any, the lender chooses to bear in the event the property is destroyed. We agree. We overrule Hunt's third point of error.

Hunt, in point of error four, claims the trial court erred in failing to find that a fact question exists as to whether Hunt is entitled to a credit against the deficiency for the amount of monies Jefferson received from the private mortgage insurance policy that pays in the event of default on the notes. Hunt contends they should be entitled to a credit for twenty to twenty-five percent of the amount of the note because Jefferson required Hunt to pay the premiums. No contract existed giving Hunt a right to an offset for private mortgage insurance coverage, nor is there a requirement at law for an offset. Hunt's position is outside the contractual agreements between the parties and wholly unsupported by the law. Hunt fails to present any evidence to support their position, therefore, the summary judgment was proper. Hence, we overrule Hunt's final point of error.

In its sole cross-point, Jefferson asserts it should be awarded damages because Hunt brought this appeal merely for delay and without sufficient cause. Jefferson alleges that this appeal is wholly without merit in that Hunt's points of error are either not supported by the law or they are completely unsupported by evidence. We disagree.

Rule 84 of the Texas Rules of Appellate Procedure states:

> In civil cases where the court of appeals shall determine that an appellate has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount (not to exceed ten percent) of the amount of damages awarded to such appellee as damages against such appellant. . . .

The court must look at the case from the point of view of the advocate and determine whether he has reasonable grounds to believe the case would be reversed. *See Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex. App. — Dallas 1985, writ ref'd n.r.e.).

While we do not hold that Hunt's agruments are strong enough for reversal, we refuse to hold that they are so unreasonable that Jefferson is entitled to damages. We overrule this cross-point and affirm the judgment of the trial court.

ED KINKEADE
Justice

(2)

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1211

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOUGLAS W. HUNT and WILLIAM J. HUNT,

Petitioners,

v.

JEFFERSON SAVINGS & LOAN ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to decide issues not presented in the State courts.

2. Whether issues concerning rights derived from deeds of trust which are contractual in nature are appropriate for review upon Petition for Writ of Certiorari.

3. Whether there is a sufficient nexus between the act complained of and the alleged involvement of the State for there to be a State deprivation of due process rights.

4. Whether receipt by Petitioners of actual notice regarding the impending acceleration and foreclosure defeats standing for the Petitioners to subsequently complain that the Texas State law, which authorizes constructive notice only rather than actual notice, fails to afford adequate due process protection.

5. Whether Petitioners, who contractually agreed to the non-judicial foreclosure, waived any right to later complain that the non-judicial foreclosure violated their due process rights.

6. Whether the subject Petition is frivolous so as to warrant awarding sanctions and double costs pursuant to Supreme Court Rules 49.2 and 50.7.

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DOUGLAS W. HUNT and WILLIAM J. HUNT,

Petitioners,

v.

JEFFERSON SAVINGS & LOAN ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, JEFFERSON SAVINGS & LOAN ASSOCIATION ("JEFFERSON"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari (the "Petition") filed by Petitioners, DOUGLAS W. HUNT and WILLIAM J. HUNT (alternately referred to as "Petitioners" or "the Hunts"), and would show the Court as follows:

OBJECTIONS TO THE JURISDICTION

This Court does not have jurisdiction in this matter. Petitioners attempt to invoke the jurisdiction of the Court under 28 U.S.C. §1257; however, this attempt must be rejected. Section 1257 provides as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may

> be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

[As amended by Act of June 27, 1988, Pub. L. No. 100-352, §3, 102 Stat. 662 (1988)].

Litigants may not invoke the Court's jurisdiction on Petition for Writ of Certiorari where the matter was not pressed or passed upon in the courts below. *Illinois v. Gates,* 462 U.S. 213 (1983); *Webb v. Webb,* 451 U.S. 493 (1981). Furthermore, where the highest State court has failed to pass upon a federal question, this Court has repeatedly held that it assumes that the omission is due to want of proper presentation of the issue to the State court absent an affirmative showing to the contrary by the petitioning party. *Clark v. Jeter,* 108 S. Ct. 1910 (1988); *The Board of Directors of Rotary International v. Rotary Club of Duarte,* 107 S. Ct. 1940 (1987).

In the instant case, Petitioners presented to the courts below the issue of the validity of the foreclosures under the terms of the deeds of trust in light of the applicable laws of the State of Texas. At pages four and five of the Petition, Petitioners discuss the points raised in the courts below. Each point is based in some way upon a contractual claim. The statement, at page six of the Petition, that the same due process arguments are advanced before this Court "although U.S. constitutional phrasology [sic] may not have been expressly included by Petitioners in their arguments before the Texas [courts]," is patently false. Petitioners did *not* present to the courts below the issue of the validity of the state statutes under the Constitution of the United States. For the convenience of

this Court, the points of error raised by Petitioners in the Supreme Court of Texas are set forth in Appendix "A" to this Brief and those raised in the Court of Appeals for the Fifth District of Texas are set forth in Appendix "B" to this Brief. This Court can see that no issue of constitutionality is properly preserved.

Moreover, the highest court of the State did not pass upon the issue. Copies of the opinions and judgments below are attached hereto for this Court's convenience as Appendix "C." Petitioners make no affirmative showing of proper presentation; therefore, based upon the record presented, the proper presumption previously recognized by opinions of this Court is that the omission is due to want of proper presentation below.

STATEMENT OF THE CASE

This is a suit based on five promissory notes, each secured by deeds of trust, executed by Douglas W. Hunt and William J. Hunt (as co-makers) and delivered to Jefferson's predecessor in interest. The Hunts defaulted on the payment of said notes.

Jefferson sent the Hunts actual notice of its intent to accelerate the notes pursuant to the deeds of trust. At page 3 of their Affidavits in Support of Defendants' Response to Plaintiff's Motion for Summary Judgment, the Hunts admitted receipt of this notice. For this Court's reference, these Affidavits are attached hereto as Appendices "D" and "E." When the Hunts failed to make payment on the notes, Jefferson accelerated the notes and posted the properties for foreclosure sale. Jefferson sent the Hunts actual notice that the acceleration had taken place along with the notice that a substitute trustee's sale would take place. The Hunts' admission of receipt of these notices is at page 4 of each of their Affidavits (Appendices "D" and "E").

The substitute trustee separately sold the properties to the highest bidder in compliance with the deeds of trust. The

substitute trustee recorded the trustee's deeds on each of the five pieces of property.

The sale proceeds were applied to the then outstanding indebtedness on each note, costs and expenses of the sales, and expenses owed by the Hunts. After applications of said offsets, a deficiency remained on the notes, and Jefferson brought suit to recover the deficiency. The Hunts filed a counterclaim alleging wrongful foreclosure and seeking damages or the setting aside of the sale. The trial court granted summary judgment in favor of Jefferson; the Court of Appeals affirmed the judgment; and the Supreme Court of Texas denied the Hunts' Application for Writ of Error and Motion for Rehearing.

ARGUMENTS

I. REASONS FOR DENYING THE WRIT

A. Want of Jurisdiction

This Court has no jurisdiction to decide issues not presented in the state courts.

A condition precedent for application for writ of certiorari is that petitioning litigants must have first presented their issues to the State courts. *Webb v. Webb*, 451 U.S. at 495-97. The record as a whole must show, either expressly or by clear implication, that a federal claim was adequately presented in the State courts. *Id.* Part of the Court's reasoning is that the principles of comity in a federal system require that State courts be afforded the opportunity to exercise their authority to construe State statutes so as to avoid or obviate federal constitutional challenges, as well as to identify independent and adequate state grounds that would pretermit a federal issue. *Id.* at 500.

The requirement that the issue be initiated in the State court system is not only a matter of comity, but also a matter of

developing the record necessary for adjudication of the issue. *Id.* at 501. In *Webb*, this Court reasoned that the failure of the State court to rule on any federal issue patently evidenced that the State court did not construe or consider that a federal issue had been presented. In this regard, the Court noted that the petitioner did not raise the court's failure to reach her federal claim as a point of error in her petition for rehearing before the State court. Accordingly, the U.S. Supreme Court held that the issue was not adequately presented and that the Supreme Court was without jurisdiction to consider such claims.

This Court reiterated the position that matters not pressed or passed upon below would not be considered by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213. This Court held that, where an issue was not adequately addressed at the State court level, the Court did not have jurisdiction over the issue. This Court noted that the "not pressed or passed upon below" rule is jurisdictional. *Id.* at 219.

In *The Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940, this Court held that it would not consider a claim that a California statute was unconstitutionally vague and overbroad where those issues were not presented squarely to the State court. *Id.* at 1948. In that case, this Court reasoned that, when the highest State court has failed to pass upon a federal question, it will assume that the omission was due to want of proper presentation in the State courts unless the petitioning party can affirmatively show the contrary. *Id.* In the State courts, petitioners presented a claim that the act complained of was violative of the club's first amendment rights, but petitioners did not address vagueness and overbreadth.

In the courts below, the Hunts presented the following issues:

1. Whether the notices sent by Jefferson to the Hunts were sufficient to satisfy the notice requirements contained

in the deeds of trust and the applicable statutory and case law of the State of Texas ("the Notice Claim");

2. Whether the trustee complied with the terms of the deeds of trust in conducting the sales ("the Single Bid Theory");

3. Whether the contractual agreements established as between the parties a value of the collateral securing the notes (the "Hazard Insurance Argument"); and

4. Whether, pursuant to the contract providing for private mortgage insurance, the Hunts were entitled to any offsets (the "PMI Argument").

See, Appendices "A" and "B" for the exact wording of the points of error raised respectively in the Supreme Court of Texas and in the Court of Appeals. It is readily apparent that the second, third, and fourth issues above are mere contract claims having nothing to do with constitutional issues. With respect to the Notice Claim, Petitioners argued below that the notices did not comply with the requirements of the deeds of trust, and therefore, did not comply with the requirements for notice set forth in *Ogden v. Gibraltar Savings Association*, 640 S.W.2d 232 (Tex. 1982).

The highest court in the State of Texas did not pass upon any federal constitutional issues, including those presented in the Petition. See Appendix "C". Petitioners make no affirmative showing of proper presentation; therefore, this Court should assume, and the record supports, that the omission is due to want of proper presentation below. *Clark v. Jeter*, 108 S.Ct. 1910.

B. Inappropriateness of Issues for Review on Writ of Certiorari

Issues concerning rights derived from deeds of trust are contractual in nature and inappropriate for review upon Petition for Writ of Certiorari.

This case is not appropriate for review on certiorari because no special or important reasons exist therefor. The Supreme Court Rule 17 provides in pertinent part as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's "discretion", indicate the character of reasons that will be considered.
>
> * * *
>
> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners attempt for the first time to cast their issues as federal questions. They are not. A "federal question" is one that is founded "directly" upon federal law. *Inter-American University of Puerto Rico, Inc. v. Concepcion,* 716 F.2d 933 (1st Cir. 1983). The federal law under which the claim arises must be a direct and essential element of the plaintiff's cause of action. *San Juan Legal Services, Inc. v. Legal Services Corp.,* 655 F.2d 434 (1st Cir. 1981). The right or immunity created by the Constitution or laws of the United States must be such that it will be supported if the Constitution or law is given one construction or effect, and defeated if it is given another. *Gulley v. First National Bank in Meridian,* 288 U.S. 112 (1936).

As is more fully set forth in the following Arguments, there is no important federal question at issue; no State court has decided a federal question which has not been, or should be, settled by this Court; and no State court has decided a federal question in a way in conflict with applicable decisions of this Court. Thus, this is not an appropriate case for review on Writ of Certiorari.

C. Lack of State Action

> There is not a sufficient nexus between the act complained of and the alleged involvement of the State for there to be a State deprivation of due process rights.

Petitioners present to this Court a question of whether there has been a State action causing them a loss of property or rights without due process. This threshold question must be answered in the negative.

The due process clause of the Fourteenth Amendment does not protect parties to a contract from each other. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *United States v. Cruikshank*, 92 U.S. 542 (1875). It protects against a State deprivation of due process rights. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). There must be a sufficiently close nexus between the State and the challenged action so that the action may be fairly treated as that of the State itself. *Lugar v. Edmondson Oil Company, Inc., et al.*, 457 U.S. 922 (1982). State officers must act jointly with a private creditor in "securing" the property in dispute in order for there to be a finding of State action.

The Fifth Circuit Court of Appeals held in *Barrera v. Security Building and Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975), that no significant State action is involved in non-judicial foreclosures under a deed of trust conforming to the requirements of Article 3810. [TEX. REV. CIV. STAT. art. 3810 (1966) (repealed 1984) is a predecessor to TEX. PROP. CODE §51.002 (Vernon 1986), the statute in effect at the time of these foreclosures.]

Petitioners suggest that State action may be found in the clerk's role in the statutory scheme. The function of the clerk in Texas, however, is completely different from the function of the North Carolina clerk as described in the case cited by Petitioners, *Turner v. Blackburn,* 389 F. Supp. 1250 (W.D.N.C. 1975). Unlike in Texas, the North Carolina clerk administrates and audits an "upset bid" procedure among other things. The North Carolina clerk is empowered with discretion. *Id.* at 1257. The Texas statutes vest no comparable power and responsibility in any agent of the state. *Barrera,* 519 F.2d at 1170.

Petitioners incorrectly state that the statutory scheme deprives the debtor of protection. It is true that in Texas a foreclosure sale is final. Unless the sale can be set aside for some irregularity or fraud, the purchasers' title is indefeasible and the former owner has no further rights respecting the property. *See Slay v. Gose,* 223 S.W. 348, 350 (Tex.Civ.App. — Fort Worth 1921, no writ). However, Texas law requires that the lender, absent waiver of notice, give to the borrower, not only notice of default and intent to accelerate, but also notice of acceleration and notice of posting for foreclosure. *Ogden,* 640 S.W.2d 232. Therefore, the borrowers have an opportunity to cure the default. The borrower has the right to retain the property by paying the indebtedness.

D. Lack of Standing

> Receipt by Petitioners of actual notice regarding impending acceleration and foreclosure defeats standing of Petitioners to subsequently complain that the Texas State law, which authorizes constructive notice only rather than actual notice, fails to afford adequate due process protection.

The Supreme Court derives its jurisdiction from Article III, §2, Clause 1 of the Constitution of the United States. 28

U.S.C.A. Const. Amend. III, §2, Cl. 1. The "judicial power" of the United States is limited to the resolution of "cases" and "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The Supreme Court does not deal with theoretical disputes, but only with concrete and specific issues raised by actual cases. *Allen-Bradley Local No. 1111 United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

Abstract injury is not enough to warrant assumption of jurisdiction by a federal court. To establish a case or controversy, it must be alleged that Plaintiff has sustained or is immediately in danger of sustaining some direct injury that is both real and immediate and not conjectural or hypothetical. *O'Shea v. Littleton*, 414 U.S. 488 (1974). As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have "standing" to challenge the action sought to be adjudicated in the lawsuit. *Valley Forge*, 454 U.S. at 472. At an irreducible minimum, this article requires the party who invokes the Court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. *Id.* United States courts have no power per se to declare statutes unconstitutional. *Id.*

There is no case or controversy presented in the matter at bar over which the Court may assume jurisdiction with respect to Petitioners' Notice Claim. Petitioners received actual notice that they were in default and that, if they did not pay the indebtedness, Jefferson would exercise its rights to accelerate the indebtedness. Petitioners further received actual notice that the debts had been accelerated and that the liens would be foreclosed. See Appendices "D" and "E".

Because Petitioners received actual notice, they lack standing to complain that the Texas statute allowing non-judicial foreclosure of the deed of trust lien allegedly requires only constructive notice rather than actual notice. Any correction of the alleged defect in the statute would have no effect on Petitioners because they actually received the notice to which they claim they were entitled. *See Id.* Accordingly, the Petition for Writ of Certiorari should be denied.

E. Waiver

Petitioners, who contractually agreed to the non-judicial foreclosure, waived any right to later complain that the non-judicial foreclosure violated their due process rights.

At page 10 of the Petition, Petitioners state, "It is not disputed that parties may waive due process rights." Validity of a waiver depends on the facts of the case. *D.H. Overmyer Co., Inc. v. Frick Co.,* 405 U.S. 174 (1972). In deciding upon the validity, courts will consider the relative bargaining power of the parties, the borrower's ability to understand the provisions of the contract, and the clarity of the contractual language. *United States v. Wynn,* 528 F.2d 1048, 1050 (5th Cir. 1976).

In this case, Petitioners, who were real estate investors, borrowed money for the purchase of five parcels of real estate. There has been no showing of disparate bargaining positions between the contracting parties or inability of the borrowers to comprehend the contract. The language of the contract is clear. Petitioners knowingly consented to the non-judicial foreclosure procedure; thus, they waived the right, if any exists, to complain that such procedure is violative of their rights. *See Overmyer,* 405 U.S. 174.

In addressing waiver, Petitioners inexplicably assert that for there to be a waiver of due process rights there must be "dual waivers" or an exchange of waivers. Petitioners cite no authority for this position, and Respondent knows of none.

Further, Petitioners attempt to apply the case of *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), to this case. *Durrett* is not related to the issues involved in this case. *Durrett* is a bankruptcy case in which the court considered the issue of the adequacy of consideration received in a foreclosure sale. The court noted that it found no decision that approved the transfer for less than 70% of the *fair market value of the property.* Fair market value of the property has nothing to do with the questions presented to this Court.

Moreover, in the instant case, Petitioners have never argued about the fair market value of the property. They have argued that when a lender purchases the property securing their loan at a foreclosure sale, the amount of hazard insurance required to be in force with respect to the property should establish the value without any right to deficiencies or overages. In other words, Petitioners are equating the amount of insurance with the *value of the loan*, not with the value of the property.

Petitioners' arguments concerning waiver are clearly without merit. For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

II. FRIVOLOUS APPEAL

The subject Petition is frivolous and warrants awarding sanctions and double costs pursuant to Supreme Court Rules 49.2 and 50.7.

Pursuant to Supreme Court Rules 49.2 and 50.7, Jefferson requests the Court to enter an order awarding Jefferson its damages incurred in connection with the filing by Petitioners of a frivolous petition for writ of certiorari and double costs.

To stay execution on the judgment, the Petitioners posted an irrevocable letter of credit which the trial court approved to

stand as a supersedeas bond. The irrevocable letter of credit provides for payment to the beneficiary, Jefferson, when all appeals available to the Hunts are exhausted. Jefferson presented the irrevocable letter of credit for payment by the issuer, MBank Dallas, N.A. ("MBank") after denial of the rehearing by the Texas Supreme Court. As originally drafted, the irrevocable letter of credit expired on January 26, 1989.

Dover Caribbean Ltd. ("Dover Caribbean"), a limited partnership in which Petitioner William J. Hunt is a partner, posted the funds for the irrevocable letter of credit. Dover Caribbean threatened to sue MBank if it paid on the irrevocable letter of credit before an application for writ of certiorari was ruled upon by the Supreme Court. [Appendix "F"].

William J. Hunt has filed for relief under the Bankruptcy Code; and, upon information and belief, Douglas W. Hunt has very few assets, and most of his few assets would be protected under Texas homestead laws. TEX. PROP. CODE ANN. § 41.001, et seq., and § 42.001, et seq. (Vernon 1984). Absent the irrevocable letter of credit, Jefferson has little prospect of collecting on the Judgment.

MBank has agreed to extend the irrevocable letter of credit for a period of 180 days from January 26, 1989. Jefferson's interests are protected only for that limited period of time. [Appendix "G"].

The Petition for Writ of Certiorari and the above and foregoing Brief in Opposition to Writ of Certiorari show that there is absolutely and unquestionably no basis for the granting of a writ of certiorari. Jefferson submits that the *sole* purpose of the Hunts' filing of the Petition for Writ of Certiorari is delay. By filing this petition, Petitioners have caused MBank to withhold payment on an irrevocable letter of credit, and Petitioners have, thereby, protected the property of Dover Caribbean in hopes that the letter of credit will expire.

This use of the court system is an abuse of the judicial process and should not be tolerated. Jefferson prays that the Court enter an order awarding it damages occasioned by the delay and double costs.

CONCLUSION

The Texas Court correctly granted Judgment in favor of Jefferson Savings & Loan Association and against Douglas W. Hunt and William J. Hunt. The Petitioners have not properly preserved any claims concerning a violation of their due process rights, and no violation of their due process rights has occurred. There has been no State action, and no federal question is presented. This Court should deny the Petition for Writ of Certiorari and award sanctions and costs to Respondent.

Respectfully submitted,

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APPENDIX "A"

POINTS OF ERROR RAISED IN THE SUPREME COURT OF TEXAS

FIRST POINT

The Court of Appeals erred in affirming summary judgment for Respondent.

SECOND POINT

The Court of Appeals erred in failing to hold that as a matter of law the foreclosure and sales under the deeds of trust here were wrongful.

THIRD POINT

Alternatively, the Court of Appeals erred in holding that there were no fact issues under this record which would prevent Respondent from being entitled to summary judgment.

FOURTH POINT

The Court of Appeals erred in failing to reverse the summary judgment because of the failure of Respondent to comply with the requirements of the deeds of trust, common law, and equity for valid acceleration of the notes and foreclosure.

FIFTH POINT

The Court of Appeals erred in affirming summary judgment for Respondent upon a theory different from and contrary to that pleaded and relied upon by Respondent and the trial court.

SIXTH POINT

The Court of Appeals erred in holding that no question of fact existed as to whether there was substantial irregularity of the substitute trustee's sale by reason of a single bid and a single sale for the five separate properties secured by five separate deeds of trust rather than separate bids and sales as required by the deeds of trust and whether such single bid and sale chilled the bidding and created grossly inadequate consideration.

SEVENTH POINT

The Court of Appeals erred in holding that no fact question existed as to whether the lender as the purchaser at the substitute trustee's sale received property "equal to the value of its indebtedness in view of the lender's imposed hazard insurance requirements.

EIGHTH POINT

The Court of Appeals erred in holding that there was no fact question as to whether Petitioners were entitled to a credit against the deficiency, if any, equal to the amount of private mortgage insurance obtained by the lender for which the premiums were paid by the borrower as a condition of the loan.

APPENDIX "B"

**POINTS OF ERROR RAISED
IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS**

POINT OF ERROR NO. 1.

THE TRIAL COURT ERRED IN GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT IN THAT:

(A) THE ACCELERATION OF THE DEBT BY APPELLEE FAILED TO FULFILL THE REQUIREMENTS NECESSARY FOR SUCH ACCELERATION AS CONTAINED IN THE DEEDS OF TRUST; AND

(B) THE SUBSEQUENT TRUSTEE'S SALES PERFORMED BASED UPON THE FLAWED ACCELERATION WERE WRONGFUL FORECLOSURES.

POINT OF ERROR NO. 2.

THE TRIAL COURT ERRED IN FAILING TO FIND THAT A QUESTION OF FACT EXISTED AS TO WHETHER OR NOT THERE WAS SUBSTANTIAL IRREGULARITY AT THE SUBSTITUTE TRUSTEE'S SALE OF A SINGLE BID AND SINGLE SALE FOR FIVE (5) SEPARATE PROPERTIES SECURED BY FIVE (5) SEPARATE DEEDS OF TRUST RATHER THAN FIVE (5) SEPARATE BIDS AND SALES AS REQUIRED BY THE DEEDS OF TRUST AND WHETHER SUCH SINGLE BID CHILLED THE BIDDING AND CREATED GROSSLY INADEQUATE CONSIDERATION.

POINT OF ERROR NO. 3.

THE TRIAL COURT ERRED IN FAILING TO FIND THAT PURSUANT TO THE LENDER'S IMPOSED HAZ-

ARD INSURANCE REQUIREMENTS A FACT QUESTION EXISTED AS TO WHETHER THE LENDER, AS A SUCCESSFUL PURCHASER AT THE SUBSTITUTE TRUSTEE'S SALE, RECEIVED PROPERTY "EQUAL TO THE VALUE OF ITS INDEBTEDNESS."

POINT OF ERROR NO. 4.

THE TRIAL COURT ERRED IN FAILING TO FIND THAT A FACT QUESTION EXISTED AS TO WHETHER AS PLEAD AS AN ALTERNATIVE BY APPELLANTS IF THERE EXISTED A DEFICIENCY APPELLANTS ARE ENTITLED TO A CREDIT AGAINST SUCH DEFICIENCY EQUAL TO THE AMOUNT OF PRIVATE MORTGAGE INSURANCE OBTAINED BY THE LENDER AND PREMIUMS FOR WHICH INSURANCE WAS PAID BY THE BORROWER AS A CONDITION OF THE LOAN.

APPENDIX "C"

ORDER OF THE TEXAS SUPREME COURT
IN THE SUPREME COURT OF TEXAS

No. C-7758

DOUGLAS W. HUNT and
WILLIAM J. HUNT

v.

JEFFERSON SAVINGS
AND LOAN ASSOCIATION

From DALLAS COUNTY
Fifth District

September 14, 1988

Application of petitioners for writ of error to the Court of Appeals for the Fifth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and HEREBY IS, DENIED.

It is further ordered that applicants, Douglas W. Hunt and William J. Hunt, pay all costs incurred on this application.

No. C-7758

DOUGLAS W. HUNT and
WILLIAM J. HUNT

v.

JEFFERSON SAVINGS
AND LOAN ASSOCIATION

From DALLAS COUNTY
Fifth District

October 26, 1988

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this the

27th day of October, 1988.

Mary M. Wakefield, clerk

By: COURTLAND CROCKER

COURTLAND CROCKER
Deputy Clerk

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

DOUGLAS W. HUNT and
WILLIAM J. HUNT,

Appellants,

v.

JEFFERSON SAVINGS &
LOAN ASSOCIATION,

Appellee.

No. 05-87-00749-CV

JUDGMENT

In accordance with this Court's opinion of June 28, 1988, the judgment of this Court is as follows: The judgment of the trial court is AFFIRMED. It is ORDERED that appellee Jefferson Savings & Loan Association recover its costs of this appeal from appellants Douglas W. Hunt and William J. Hunt and from the cash deposit in lieu of appeal bond. After all costs have been paid, the clerk of the district court is directed to release the balance, if any, of the cash deposit to Charles Marcus, attorney for Douglas W. Hunt and William J. Hunt.

June 28, 1988.

/s/ ED KINKEADE

ED KINKEADE
Justice

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-87-00749-CV

DOUGLAS W. HUNT and WILLIAM J. HUNT, *Appellants,*	FROM A DISTRICT
v.	COURT OF
JEFFERSON SAVINGS AND LOAN ASSOCIATION, *Appellee.*	DALLAS COUNTY, TEXAS

BEFORE JUSTICES HOWELL, LAGARDE AND KINKEADE
OPINION BY JUSTICE KINKEADE
June 28, 1988

Appellants, Douglas W. and William J. Hunt (collectively Hunt), appeal a summary judgment rendered for appellee, Jefferson Savings and Loan Association (Jefferson), for a $184,498.77 deficiency created by a trustee's sale of five properties. The suit is based on five promissory notes, secured by deeds of trust, executed by Douglas W. Hunt and William J. Hunt (as co-maker) and delivered to Jefferson's predecessor in interest, Congressional Mortgage Corporation of Texas. After default by Hunt on payment of each note, Jefferson foreclosed on the properties and sued Hunt for deficiencies on each note, plus attorney fees, interest, and costs. Hunt counterclaimed, seeking damages for wrongful foreclosure plus attorney fees. The trial court granted summary judgment in favor of Jefferson denying Hunt's counterclaim.

In four points of error, Hunt claims the trial court erred in: 1) granting Jefferson's motion for summary judgment because the note acceleration and the trustee's foreclosure sale was improper; 2) granting Jefferson's motion for summary judgment because a fact question exists as to irregularities at the trustee's sale; 3) failing to find that a fact question exists as to whether the lender received property "equal to the value of its indebtedness;" and 4) failing to find that a fact question exists as to whether Hunt is entitled to a credit for the amount of insurance proceeds Jefferson received from the private mortgage insurance policy. Jefferson, in its sole cross-point, requests damages for delay. We overrule all points of error and the cross-point and affirm the judgment.

On October 25, 1982, Hunt borrowed $263,000 from Congressional Mortgage Corporation of Texas for the purchase of five condominiums. Hunt executed five promissory notes, agreeing to make installment payments and assume other obligations under the notes until all payments were made. Douglas Hunt executed and delivered five deeds of trust on the properties as collateral to secure payment of the notes. On October 29, 1982, Congressional transferred the notes and all interest in the properties to Jefferson. Hunt subsequently defaulted under the terms of the notes and deeds of trust.

On January 8, 1986, Jefferson sent Hunt notice that unless payment was made, it intended to exercise its options under the deeds of trust and accelerate the notes. This would result in foreclosure of the properties. The notice also stated that after acceleration, Hunt had the option to reinstate the loan and/or bring suit alleging any defenses. On March 10, 1986, Jefferson sent Hunt notice that acceleration had taken place, all unpaid payments were declared due and payable, and that a substitute trustee's sale would take place on April 1, 1986. On April 1, 1986, the trustee sold the properties for $125,280 resulting in a deficiency of $182,498.77. Jefferson filed suit for the deficiency.

In point of error one, Hunt claims the summary judgment was improper because Jefferson failed to follow requirements of the deeds of trust to accelerate and all foreclosures were wrongful. We disagree. When the holder of a promissory note has the option to accelerate maturity of the note upon the maker's default, equity demands notice be given of the intent to exercise the option. *Brown v. Hewitt,* 143 S.W.2d 223, 224 (Tex. Civ. App. — Galveston 1940, writ ref'd). Thus, absent waiver, the holder of a delinquent installment note must present the note and demand payment of the past-due installments prior to exercising his right to accelerate. *Allen Sales and Servicenter, Inc. v. Ryan,* 525 S.W.2d 863, 866 (Tex. 1975). In the case of a mortgage secured by a deed of trust, such notice must afford an opportunity to cure the default and bring home to the mortgagor that failure to cure will result in acceleration of the note and foreclosure under the power of sale. *Lockwood v. Lisby,* 476 S.W.2d 871, 873 (Tex. Civ. App. — Fort Worth 1972, writ ref'd n.r.e.). If, after such notice, the mortgagor fails to remedy the breach, then the mortgagee is authorized to accelerate maturity and begin foreclosure proceedings under the deed of trust. *See Natali v. Withaus,* 134 Tex. 513, 135 S.W.2d 969, 977 (1940).

Hunt contends Jefferson did not properly accelerate the notes because notice was not sent to Hunt. We disagree. The initial notice of January 8, 1986, set forth the breach — the non-payment; the action required to cure the breach — payment of $38,351.98; the deadline to cure — February 10, 1986; and the result of failure to cure — acceleration.

Hunt failed to cure the default and on March 10, 1986, Jefferson sent a second notice declaring all unpaid amounts were due and payable and that the properties would be foreclosed on April 1, 1986. Summary judgment was properly granted since all notices required by law and by the deeds of trust were met. We overrule Hunt's first point of error.

Hunt, in point of error two, claims the trial court erred in failing to find that a question of fact exists as to whether or not there was substantial irregularity at the substitute trustee's sale. Hunt contends that a single bid and single sale occurred for all five properties, chilling the bidding and resulting in an inadequate sale price.

Mere inadequacy of consideration is not grounds for setting aside a trustee's sale, but evidence of an irregularity that causes or contributes to a grossly inadequate price is. *American Savings v. Musick,* 531 S.W.2d 581, 587 (Tex. 1975). Evidence showing that a better price would have resulted if the sale was conducted in a different manner is required. *Bellah v. First National Bank of Hereford,* 474 S.W.2d 785, 788 (Tex. Civ. App. — Eastland 1971, writ ref'd n.r.e.). Hunt failed to present any evidence to raise a fact question as to whether the consideration was inadequate or any irregularity occurred. Jefferson attached an exhibit to its motion for summary judgment setting forth in detail the amounts that were bid on each property. This evidence, along with the fact that the properties were separately posted for sale and that separate substitute trustee deeds were executed, supports the court's findings that a proper sale occurred. Hunt's second point of error is overruled.

In point of error three, Hunt claims the trial court erred in failing to find that, pursuant to the lender's imposed hazard insurance requirements, a fact question existed as to whether the lender as the successful purchaser at the substitute trustee's sale received property "equal to the value of its indebtedness." We disagree.

Hunt contends that they were required to maintain hazard insurance on each property equal to the loan values and Jefferson is bound by those values at foreclosure. No authority is cited by Hunt for this proposition. Jefferson asserts that the insurance requirement is merely evidence of the amount of risk, if any, the lender chooses to bear in the event the property is destroyed. We agree. We overrule Hunt's third point of error.

Hunt, in point of error four, claims the trial court erred in failing to find that a fact question exists as to whether Hunt is entitled to a credit against the deficiency for the amount of monies Jefferson received from the private mortgage insurance policy that pays in the event of default on the notes. Hunt contends they should be entitled to a credit for twenty to twenty-five percent of the amount of the note because Jefferson required Hunt to pay the premiums. No contract existed giving Hunt a right to an offset for private mortgage insurance coverage, nor is there a requirement at law for an offset. Hunt's position is outside the contractual agreements between the parties and wholly unsupported by the law. Hunt fails to present any evidence to support their position, therefore, the summary judgment was proper. Hence, we overrule Hunt's final point of error.

In its sole cross-point, Jefferson asserts it should be awarded damages because Hunt brought this appeal merely for delay and without sufficient cause. Jefferson alleges that this appeal is wholly without merit in that Hunt's points of error are either not supported by the law or they are completely unsupported by evidence. We disagree.

Rule 84 of the Texas Rules of Appellate Procedure states:

> In civil cases where the court of appeals shall determine that an appellant has taken an appeal for delay and without sufficient cause, then the court may, as part of its judgment, award each prevailing appellee an amount (not to exceed ten percent) of the amount of damages awarded to such appellee as damages against such appellant . . . .

The court must look at the case from the point of view of the advocate and determine whether he has reasonable grounds to believe that the case would be reversed. *See Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660, 663 (Tex. App. — Dallas 1985, writ ref'd n.r.e.)

While we do not hold that Hunt's arguments are strong enough for reversal, we refuse to hold that they are so unreasonable that Jefferson is entitled to damages. We overrule this cross-point and affirm the judgment of the trial court.

/s/ ED KINKEADE

ED KINKEADE
Justice

PUBLISH
TEX. R. APP. P. 90.

87-00749.1F

APPENDIX "D"

AFFIDAVIT OF WILLIAM J. HUNT

No. 86-9371-H

JEFFERSON SAVINGS AND ASSOCIATION	IN THE 160TH DISTRICT
v.	COURT OF
DOUGLAS W. HUNT and WILLIAM J. HUNT	DALLAS COUNTY, TEXAS

AFFIDAVIT IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM J. HUNT, Affiant, who, after being by me duly sworn upon oath stated:

1. My name is WILLIAM J. HUNT. I am one of the Defendants in the above styled and numbered cause of action. I am over twenty one (21) years of age, am of of [sic] sound mind. I am capable of making this Affidavit in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment. I have personal knowledge of each of the matters stated herein.

2. On or about October 25, 1982, Douglas W. Hunt and I made, executed and delivered five (5) separate promissory notes each payable to Congressional Mortgage Corporation of

Texas for loans used in purchasing units numbered B-2038, B-2040, B-2046, B-2049, and B-2051 in the Stratford Condominiums in Dallas, Texas 75231. On the same date the five (5) separate promissory notes were delivered to Congressional Mortgage Corporation of Texas. Copies of said promissory notes are attached hereto, Marked Exhibits A-1 through A-5, and made a part hereof by reference.

3. On the same date that the five (5) separate promissory notes were made and delivered to Congressional Mortgage Corporation of Texas, October 25, 19823 [sic] Douglas W. Hunt made, executed and delivered to Congressional Mortgage Corporation of Texas five (5) separate Deeds of Trust to secure the performance of the five (5) promissory notes. Copies of the said Deeds of Trust are attached hereto, Marked Exhibits B-1 through B-5, and made a part hereof by reference.

4. As a requirement to the making of the above described loans, Congressional Mortgage Corporation of Texas required the [sic] Douglas W. Hunt and me, to obtain and pay for Private Mortgage Insurance with Congressional Mortgage Corporation of Texas as the Beneficiary. All of the negotiations to obtain the desired Private Mortgage Insurance with the issuing company were conducted by Edward Dayton, the president of Congressional Mortgage Corporation of Texas. Mr. Dayton selected the company that was to write the insurance. Mr. Dayton made all representations or inducements that were made to effect the issuance of the insurance. Mr. Dayton made all arrangements for the delivery of the desired Private Mortgage Insurance to the beneficiary of the insurance and it was Mr. Dayton or a party in the office of Congressional Mortgage Corporation of Texas that affirmed for the title company that the requirement of Private Mortgage Insurance had been satisfied. I was not informed nor made knowledgable [sic] in what company the policy was written or any of the terms or conditions contained in the said policy. As a part of the closing of the five separate purchases, Douglas W. Hunt and I were

required to pay the premium for the Private Mortgage Insurnce [sic] and that was our only contact with the insurance.

5. Prior to the Closing and as a requirement for the closing of the loan transactions, Douglas W. Hunt and I were required to furnish for Congressional Mortgage Corporation of Texas proof that Hazard Insurance insuring against losses by fire, hazards included within the term "extended coverage", and such other hazards as Congressional Mortgage Corporation of Texas might require and in an amount sufficient to pay the sums secured by the Deeds of Trust. The five (5) separate parcels being located in The Stratford Condominiums, that requirement was permitted to be satisfied with a showing that the Condominium Owners Association provided Hazard Insurance sufficient to satisfy the Lender's requirements.

As a condition of the Deeds of Trust delivered by Douglas W. Hunt, Douglas W. Hunt was required to keep the improvements insured with like Hazard Insurance or such other hazards as the Lender might require and in such amounts a [sic] for such periods as the lender might require. The Lender had the right to reject the insurance carrier.

6. I later learned that on or about October 29, 1982, Congressional Mortgage Corporation of Texas assigned its rights in the said five (5) separate Promissory Notes and the five (5) separate Deeds of Trust to Jefferson Savings & Loan Association, without recourse.

7. Douglas W. Hunt, became delinquent in the payments on the five (5) separate promissory notes during 1985.

8. On or about January 11, 1986, I received a coy [sic] of a demand letter letter from Jefferson Savings & Loan Association over the signature of John P. Burke, Assistant Vice President dated January 8, 1986 and addressed to Douglas w. [sic] Hunt demanding payments totaling $38,351.98. A copy of said letter is attached hereto, marked Exhibit C and made a part hereof by reference.

9. The said letter, Exhibit C to this Affidavit was a demand for payment and notice that it was the *intention of Jefferson Savings & Loan Association to accelerate all unpaid principal and accrued unpaid interest if Douglas W. Hunt failed to pay the total amount of past due payments and payments that may become due on or before the date designated as the cure date, February 10, 1986.* In said letter, Jefferson Savings & Loan Association made the statement:

> " . . . . If you do not pay to Jeffrson [sic] the total amount which is past due on each of the notes, together with any additional monthly payments on the notes which may become due, on or before February 10, 1986, we will accelerate all unpaid principal and accrued unpaid interest under your notes, which amounts shall be immediately due and payable. This letter constitutes our *notice of intention to accelerate,* if the past due payments are not made."

This letter contained all the elements required of the Lender of a notice *prior to acceleration* as set out in Paragraph 18 of the separate Deeds of Trust.

10. I thereafter did not receive either a letter or a copy of a letter from Jefferson Savings & Loan Association after the date for curing the default, February 10, 1986, in which Jefferson Savings [sic] Loan Association stated that it was exercising its option of accelerating all unpaid principal and accrued interest under the several notes.

11. After February 10, 1986, the first letter received that related to the five (5) parcels of property was a copy of a letter from the law firm of Shank, Irwin & Conant dated March 10, 1986, over the signature of Abbey B. Garber addressed to Douglas W. Hunt that accompanied the delivery of copies of five (5) separate notices of Trustee's Sales for April 1, 1986. A copy of said letter is attached hereto, marked Exhibit E, and made a part hereof by this reference.

12. The letter dated March 10, 1986, from the law firm of Shank, Irwin & Conant, was a cover letter that transmitted the notices of Trustee's Sale. The reference in the letter:

> "All unpaid principal and interest on the above notes *has been declared due and payable.*"

could only refer to a previous letter. The only previous letter related to principal and in [sic] interest on the properties was the letter of Jefferson Savings & Loan Association dated January 8, 1986, which letter was the letter that was required to be sent pursuant to the provisions of Paragraph 18 of the several Deeds of Trust *before acceleration.*

13. Plaintiff in its Motion for Summary Judgment in Paragraph II 1) sets forth that:

> "The Defendants agreed to make various installment payments, including interest and other payments, until the Notes were paid in full and *further agreed to perform all other obligations as set out in the Notes.*" (Emphasis Mine)

One of the other obligations assumed by "The Defendants" was *to furnish initially and then to maintain Hazard Insurance in amounts required and for hazards as required by the Lender,* up to the full amount required to satisfy the sums due on the Notes and secured by the Deeds of Trust. This was a contractual agreement between Borrower and Lender and was absolutely required by Lender.

The Lender as the successful purchaser at the Trustee's Sale received "The Property" upon which it had set a value and required insurance in that amount to be maintained upon it. That parcel of property with that value so established was the property received by the Lender when it was the only and highest bidder as alleged in Plaintiff's Motion for Summary Judgment in Paragraph II 6) regardless of the dollar amount of the bid by the Lender, Plaintiffherein. [sic].

14. Douglas W. Hunt and I have been forced by the wrongful acts of Plaintiff, the wrongful foreclosure, to employ Charles Marcus to defend us in this said cause of action and the Plaintiff should be required to pay such expenses.

FURTHER, AFFIANT SAYETH NOT.

/s/ WILLIAM J. HUNT

WILLIAM J. HUNT
Affiant

Subscribed and Sworn to before me on this the 12th day of February, 1987.

/s/ JUSTINE LAMENDOLA

Notary Public

My Commission Expires:
4-11-87

Printed Name:

JUSTINE M. LAMENDOLA
Notary Public, State of Texas

My Commission Expires: ____

APPENDIX "E"

AFFIDAVIT OF DOUGLAS W. HUNT

No. 86-9371-H

JEFFERSON SAVINGS AND LOAN ASSOCIATION	IN THE 160TH DISTRICT
v.	COURT OF
DOUGLAS W. HUNT and WILLIAM J. HUNT	DALLAS COUNTY, TEXAS

AFFIDAVIT IN SUPPORT OF DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared DOUGLAS W. HUNT, Affiant, who, after being by me duly sworn upon oath stated:

1. My name is DOUGLAS W. HUNT. I am one of the Defendants in the above styled and numbered cause of action. I am over twenty one (21) years of age, am of of [sic] sound mind. I am capable of making this Affidavit in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment. I have personal knowledge of each of the matters stated herein.

2. On or about October 25, 1982, I, Douglas W. Hunt and WILLIAM J. HUNT made, executed and delivered five (5) separate promissory notes each payable to Congressional Mortgage Corporation of Texas for loans used in purchasing units

numbered B-2038, B-2040, B-2046, B-2049, and B-2051 in the Stratford Condominiums in Dallas, Texas 75231. On the same date the five (5) separate promissory notes were delivered to Congressional Mortgage Corporation of Texas. Copies of said promissory notes are not attached hereto as said promissory notes were attached to the affidavit of Willaim [sic] J. Hunt, however I refer to those exhibits.

3. On the same date that the five (5) separate promissory notes were made and delivered to Congressional Mortgage Corporation of Texas, October 25, 19823, [sic] I, Douglas W. Hunt made, executed and delivered to Congressional Mortgage Corporation of Texas five (5) separate Deeds of Trust to secure the performance of the five (5) promissory notes. Copies of the said Deeds of Trust are not attached hereto as said exhibits are made exhibits to the affidavit of William J. Hunt.

4. As a requirement to the making of the above described loans, Congressional Mortgage Corporation of Texas required William J. Hunt and me, to obtain and pay for Private Mortgage Insurance with Congressional Mortgage Corporation as the Beneficiary. All of the negotiations to obtain the desired Private Mortgage Insurance with the issuing company were conducted by Edward Dayton, the president of Congressional Mortgage Corporation of Texas. Mr. Dayton selected the company that was to write the insurance. Mr. Dayton made all representations or inducements that were made to effect the issuance of the insurance. Mr. Dayton made all arrangements for the delivery of the desired Private Mortgage Insurance to the beneficiary of the insurance and it was Mr. Dayton or a party in the office of Congressional Mortgage Corporation of Texas that affirmed for the title company that the requirement of Private Mortgage Insurance had been satisfied. I was not informed nor made knowledgable [sic] in what company the policy was written or any of the terms or conditions contained in the said policy. As a part of the closing of the five separate purchases, William J. Hunt and I were required to pay the

premium for the Private Mortgage Insurnce [sic] and that was our only contact with the insurance.

5. Prior to the Closing and as a requirement for the closing of the loan transactions, William J. Hunt and I were required to furnish for Congressional Mortgage Corporation of Texas proof that Hazard Insurance insuring against losses by fire, hazards included within the term "extended coverage", and such other hazards as Congressional Mortgage Corporation of Texas might require and in an amount sufficient to pay the sums secured by the Deeds of Trust. The five (5) separate parcels being located in The Stratford Condominiums, that requirement was permitted to be satisfied with a showing that the Condominium Owners Association provided Hazard Insurance sufficient to satisfy the Lender's requirements.

As a condition of the Deeds of Trust delivered by me, I was required to keep the improvements insured with like Hazard Insurance or such other hazards as the Lender might require and in such amounts and for such periods as the lender might require. The Lender had the right to reject the insurance carrier.

6. I later learned that on or about October 29, 1982, Congressional Mortgage Corporation of Texas assigned its rights in the said five (5) separate Promissory Notes and the five (5) separate Deeds of Trust to Jefferson Savings & Loan Association, without recourse.

7. The loans became delinquent in the payments on the five (5) separate promissory notes during calendar year 1985.

8. On or about January 11, 1986, I received a demand letter from Jefferson Savings & Loan Association over the signature of John P. Burke, Assistant Vice President dated January 8, 1986 demanding payments totaling $38,351.98. A copy of said letter is attached hereto, marked Exhibit C and made a part hereof by reference.

9. The said letter, Exhibit C to this Affidavit was a demand for payment and notice that it was the *intention of Jefferson Savings & Loan Association to accelerate all unpaid principal and accrued unpaid interest if failed to pay the total amount of past due payments and payments that may become due on or before the date designated as the cure date, February 10, 1986.* In said letter, Jefferson Savings & Loan Association made the statement:

> " . . . . If you do not pay to Jefferson the total amount which is past due on each of the notes, together with any additional monthly payments on the notes which may become due, on or before February 10, 1986, we will accelerate all unpaid principal and accrued unpaid interest under your notes, which amounts shall be immediately due and payable. This letter constitutes our *notice of intention to accelerate,* if the past due payments are not made."

This letter contained all the elements required of the Lender of a notice *prior to acceleration* as set out in Paragraph 18 of the separate Deeds of Trust. I had expected a letter informing me that the Lender had accelerated the payments, but that letter never came.

10. I did not receive either a letter or a copy of a letter from Jefferson Savings & Loan Association after the date for curing the default, February 10, 1986, in which Jefferson Savings [sic] Loan Association stated that it was exercising its option of accelerating all unpaid principal and accrued interest under the several notes.

11. After February 10, 1986, the first letter I received that related to the five (5) parcels of property was a letter from the law firm of Shank, Irwin & Conant dated March 10, 1986, over the signature of Abbey B. Garber and along with that letter there were five (5) notices of Trustee's Sales for April 1, 1986. A copy of said letter is attached hereto, marked Exhibit D, and made a part hereof by this reference.

12. The letter dated March 10, 1986, from the law firm of Shank, Irwin & Conant transmitting the notices of Trustee's Sale made a reference:

> "All unpaid principal and interest on the above notes *has been declared due and payable."*

At the time I received that letter, I reviewed my files and after considerable search I determined that the reference was to the only previous letter related to principal and interest on the properties, the letter of Jefferson Savings & Loan Association dated January 8, 1986, which letter was the letter that was required to be sent pursuant to the provisions of Paragraph 18 of the several Deeds of Trust *before an acceleration.*

13. Plaintiff in its Motion for Summary Judgment in Paragraph II 1) sets forth that:

> "The Defendants agreed to make various installment payments, including interest and other payments, until the Notes were paid in full and *further agreed to perform all other obligations as set out in the Notes."* (Emphasis Mine)

One of the other obligations assumed by "The Defendants" was *to furnish initially and then to maintain Hazard Insurance in amounts required and for hazards as required by the Lender,* up to the full amount required to satisfy the sums due on the Notes and secured by the Deeds of Trust. I considered that requirement to be one that I contracted to do when I signed the Deeds of Trust and considered the Deeds of Trust to be contractual agreements between me as Borrower and the Lender and that the requirement was an absolute requirement by the Lenderand [sic] one that if I did not fulfill, the Lender could consider a default.

I consider that the Lender as the successful purchaser at the Trustee's Sale received "The Property" upon which the Lender set values for the required amounts of insurance that I was required to maintain on the several properties. The parcels

of property that the Lender was the successful purchaser at the Trustee's Sale was the same property that the Lender used in making the requirement as to value for insurance. I considered the value of the parcels or property to be at least equal to the value so established by the Lender and when the Lender was the only and highest bidder as alleged in Plaintiff's Motion for Summary Judgment in Paragraph II 6) regardless of the dollar amount of the bid by the Lender, the Lender had received property of a value at least equal to the indebtedness to the Lender.

14. William J. Hunt and I have been forced by the wrongful acts of Plaintiff, the wrongful foreclosure, to employ Charles Marcus to defend us in this said cause of action and the Plaintiff should be required to pay such expenses.

FURTHER, AFFIANT SAYETH NOT.

/s/ DOUGLAS W. HUNT

DOUGLAS W. HUNT
Affiant

Subscribed and Sworn to before me on this the 12th day of February, 1987.

/s/ JUSTINE M. LAMENDOLA

Notary Public

My Commission Expires:
4-11-87

Printed Name:

JUSTINE M. LAMENDOLA
Notary Public, State of Texas

My Commission Expires

APPENDIX "F"

IRREVOCABLE STANDBY LETTER OF CREDIT NO. 4064793003-18 1/26/88 LM

BENEFICIARY	*APPLICANT*
Jefferson Savings and Loan Association 550 Broadview Avenue Warrington, Virginia 22186	William J. Hunt 4208 Glenaire Dallas, Texas 75229
AMOUNT $250,000.00 (Two Hundred Fifty Thousand and 00/100 U.S. Dollars)	*EXPIRY DATE* January 26, 1989 At our counters

Gentlemen:

We hereby issue our Irrevocable Standby Letter of Credit in your favor available by your draft on us at sight bearing the clause "Drawn under MBank — Dallas, N.A., Letter of Credit No. 4064793003-18 dated January 26, 1988", accompanied by the following documents:

1. This original Letter of Credit.

2. Certified documents certifying that the Judgement in Cause No. 86-9371H in the 160th Judicial District Court, Dallas County, Texas in favor of Jefferson Savings and Loan Association against Douglas W. Hunt and William J. Hunt has been affirmed and that no additional appeals are available to Douglas W. Hunt and William J. Hunt.

Special Instructions: Negotiations restricted to MBank — Dallas, N.A. PARTIAL DRAWINGS ARE NOT PERMITTED.

This Letter of Credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended, or amplified by reference to any document, instrument or agreement referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement.

We hereby engage with you that the draft drawn under and in compliance with the terms of this credit will be duly honored on due presentation and delivery of documents to us.

Except as otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision) International Chamber of Commerce, Publication No. 400.

Very truly yours

_____

Authorized Signatures
MBANK DALLAS, N.A.

LETTER OF AMENDMENT NO. 1 **DATE: June 22, 1988**

BENEFICIARY	*APPLICANT*
Jefferson Savings and Loan Association 550 Broadview Avenue Warrington, Virginia 22186	William J. Hunt 4208 Glenaire Dallas, Texas 75229
DATE OF ISSUE	*PLACE OF ISSUE*
January 26, 1988	Dallas, Texas

LETTER OF CREDIT NUMBER: 4064793003-18

The above-mentioned Letter of Credit is amended as follows:

1. Change documentary requirement No. 2 to read:

2. Copy of Mandate issued by the Dallas court of appeals or the Texas Supreme Court, affirming judgement in favor of Jefferson Savings and Loan Association against Douglas W. Hunt and William J. Hunt in Cause No. 86-9371H from the 160th Judicial District Court, Dallas County, Texas.

2. Add the following under documentary requirements:

3. Certified statement from counsel representing Jefferson Savings and Loan Association, stating that the Judgement in Cause No. 86-9371H in the 160th Judicial District Court, Dallas County, Texas in favor of Jefferson Savings and Loan Association against Douglas W. Hunt and William J. Hunt has been affirmed and that no additional appeals ara [sic] available to Douglas W. Hunt and William J. Hunt.

All other terms and conditions remain unchanged.

This Letter of Amendment is to be considered as part of the above Letter of Credit and must be attached thereto.

MBANK — DALLAS, N.A.

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Authorized Signatures

APPENDIX "G"

LETTER OF AMENDMENT NO. 2 **DATE: January 13, 1989 IR**

BENEFICIARY	*APPLICANT*
Jefferson Savings and Loan Association 550 Broadview Avenue Warrington, Virginia 22186	William J. Hunt 4208 Glenaire Dallas, Texas 75229
DATE OF ISSUE	*PLACE OF ISSUE*
January 26, 1988	Dallas, Texas

LETTER OF CREDIT NUMBER: 4064793003-18

The above-mentioned Letter of Credit is amended as follows:

Extend the expiration date to July 26, 1989.

All other terms and conditions remain unchanged.

This Letter of Amendment is to be considered as part of the above Letter of Credit and must be attached thereto.

MBANK — DALLAS, N.A.

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Authorized Signatures

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Texas Supreme Court has been served, by certified mail, return receipt requested, upon all persons required to be served, including attorneys of record for Petitioners, Thomas Farrell Egge, Esq., 5904 Richmond Highway, Alexandria, Virginia 22303, and Earl Bentley, Esq., 8111 Preston Road, Suite 950, Dallas, Texas 75225, on this the 21st day of February, 1989.

/s/ PATRICK C. GUILLOT

PATRICK C. GUILLOT